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GENESIS FORCE SDN BHD

v.

SARAWAK COAL RESOURCES SDN BHD & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[SUIT NO: S-22-90-2008-III]
13 JUNE 2011

C ***CIVIL PROCEDURE:*** *Public Authority - Decision of - Challenging decision of Public Authority - Whether should be by way of judicial review - Rules of the High Court 1980, O. 53*

INTELLECTUAL PROPERTY: *Copyright - Infringement of - Copyright in reports - Whether copyright in reports established - Whether* D *plaintiff proved that defendant infringed copyright*

TORT: *Conspiracy to injure - Whether defendants acted in concert to harm - Whether plaintiff had proved conspiracy on part of defendants*

E The plaintiff and defendant were companies whose respective businesses involved coal exploration and mining. The second defendant was the Director of Lands & Surveys, Sarawak whilst the third defendant was the Government of the State of Sarawak. The plaintiff claimed that Sarawak Electricity Supply Corporation F (SESCO) invited the plaintiff to prospect for coal in its General Prospecting Licence (GPL) area. An agreement between the two ensued and as a result of its exploration works, two reports were prepared by the plaintiff, namely the Genesis Report and the Northeast Report. In June 2003, a Mining Certificate (MC) was G granted to the plaintiff by the Superintendent of Lands & Surveys, which was to be valid for 15 years. The MC included only Areas 1, 2, 3, 4 within its GPL areas. The plaintiff's application for the MC into areas 6, 8, 9 - 16 was rejected. The plaintiff's GPL was also subsequently not renewed. It was later discovered that the H first defendant was issued with a Prospecting Licence (PL), Mining Licence (ML) and MC which the plaintiff claimed were within their GPL. The plaintiff now seeks a declaration that the MC granted to the first defendant was null and void on the ground that the approval of the MC to the first defendant flawed as it was I dictated by the Permanent Secretary of the Ministry of Planning and resource Management who had interest in the first defendant; failure to comply with the Mining Ordinance by the first

defendant; and the fact that the first defendant used the Genesis and Northeast Reports to procure the MC. The plaintiff also based his action on the private law of tort of conspiracy and breach of copyright. The first defendant, in its counterclaim, alleged that the plaintiff's sub-contractor had carried out mining works in specific areas which fell under the MC of the first defendant. The first defendant therefore counterclaimed for trespass. The preliminary issue for consideration was whether this matter fell within O. 53 Rules of the High Court 1980 and therefore suitable for judicial review.

Held (dismissing the plaintiff's claim and allowing the first defendants' counterclaim):

(1) It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power. The exception to this rule is where the validity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. (para 11)

(2) The second defendant was a public authority and issued the MC to the first defendant in the purported exercise of its statutory power under the Mining Ordinance. The ML was approved by the State Cabinet and the issuance of the MC was consequent to that decision. The grounds which the plaintiff invoked to nullify the issuance of the MC, *ie*, conflict of interests, corrupt motive, mala fide etc clearly belonged to public law. The plaintiff's action to nullify the MC issued to the first defendant had substantive public law element and it did not come within any of the general exceptions. (paras 12-14)

(3) On the issue of breach of copyright over the reports, the plaintiff had the burden to establish copyright over the reports. According to witnesses, the contents of the reports were not original and could have been plagiarised. The plaintiff had therefore failed to prove copyright over the reports. Even

A if the reports were original, the plaintiff had failed to prove that the defendants had used those reports for the same coal exploration purposes. (paras 20-24)

(4) There was no evidence that the defendants acted in concert B to do any damage to the plaintiff. Furthermore in a claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability be established before the Government can be made liable vicariously as the principal. In this case C the action against the second and third defendants was flawed because individual government officers were not cited as the defendants. The action against the first defendant therefore should also fail as the tort of conspiracy by definition requires the agency of more than one person. Therefore the tort of D conspiracy against the defendants must fail. (paras 29-36)

(5) The facts disclosed that the plaintiff had in fact trespassed into the areas that fell within the MC of the first defendant. (para 48)

E **Case(s) referred to:**

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(foll)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(foll)***

F *Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA* ***(refd)***

Lonrho Ltd v. Shell Petroleum Co Ltd [1981] 2 All ER 456 ***(foll)***

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(foll)***

Yap J.H. v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC ***(foll)***

G **Legislation referred to:**

Mining Ordinance of Sarawak 1958, ss. 10, 32, 40

Rules of the High Court 1980, O. 53

For the plaintiff - Albert Tang; M/s Chew, Jugah, Wan Ullok & Co

H *For the 1st defendant - George Lo; M/s George Lo & Partners Advocs*

For the 2nd & 3rd defendants - Alvin Chong (Alicia Voon with him); M/s Alvin Chong & Partners Advocs

Reported by EM Goh

I

JUDGMENT

Ravinthran Paramaguru JC:

Introduction

[1] This suit concerns a dispute between the plaintiff and the 1st defendant over the right to mine coal in the Mukah-Balingian area. The 2nd and 3rd defendants have been joined as defendants as well because of the allegation that they conspired to injure the plaintiff by granting mining rights to the 1st defendant. The plaintiff's main objective in this suit is to nullify the mining rights granted to the 1st defendant by the Government of Sarawak. The plaintiff has also alleged that the 1st defendant has used confidential information belonging to the plaintiff to carrying out coal exploration and mining. The ancillary reliefs sought are for damages to be assessed for profiting from breach of copyright to this information. The 1st defendant, on the other hand, has counterclaimed that the plaintiff had committed trespass and illegal mining.

Plaintiff's Case

[2] The plaintiff is a company whose business involves coal exploration and mining. The same can be said of the 1st defendant. From the evidence, there is only one major purchaser of coal in Sarawak, ie, Sarawak Electricity Supply Corporation (SESCO). It is a statutory body established by State Law. The coal is used by its subsidiary companies who are involved in electrical power generation. SESCO was originally granted a General Prospecting Licence (GPL) by the Sarawak Government over a large area of 92 sq. km in the Mukah-Balingian area. Around the same time SESCO had invited the plaintiff to prospect for coal in its GPL area. SESCO and the plaintiff signed a Prospecting Agreement (PA) on 15 February 2002. The plaintiff claims that as a result of their exploration works, they prepared a report dated 5 April 2002 known as the Report on the Exploratory Coal Survey on the Mukah-Balingian Coalfield (the Genesis Report). On 26 June 2003, the Superintendent of Lands and Surveys granted a Mining Certificate (MC) over 282 hectares of land to the plaintiff. The MC was to be valid for 15 years. SESCO then entered into an agreement on 30 July 2002 (called the Supplementary Agreement) with the owners of the plaintiff, ie,

A Mega Arif Sdn Bhd. By virtue of this agreement, the plaintiff became a joint venture company of Mega Arif Sdn Bhd and SESCO. SESCO took up 15% shares in the plaintiff whereas Mega Arif Sdn Bhd retained 85% shares. SESCO was also allowed to nominate directors to the board of the plaintiff. Following this
B arrangement, SESCO wrote to the 2nd defendant, the Director of Lands and Surveys, for issuance of the GPL directly in the name of the plaintiff. The 2nd defendant issued a GPL over a smaller area to the plaintiff. The new GPL was valid from 1 March 2005 to 1 March 2007. On 31 December 2003, the plaintiff entered
C into a Sale and Purchase Agreement with PPLS Power Generation Sdn Bhd which is a wholly owned subsidiary of SESCO. The agreement provided for the plaintiff to sell coal to PPLS Power Generation Sdn Bhd for 25 years. The plaintiff then entered into an agreement with a Chinese company known as the Northeast
D Coal Geological Bureau to verify preliminary findings of coal in its GPL area. The Chinese company compiled a report known as the Report for Geological Investigation of the Proposed Open Cut Coal mine in Mukah, Sarawak (the Northeast report) for use by the plaintiff. The plaintiff allegedly seconded one of its employees,
E one Mr. Kiew Fook Min to the Chinese company to assist in the verification and compilation of the Northeast report. At that time, the plaintiff's MC included Areas 1, 2, 3, and 4 within its GPL area. The plaintiff applied to expand its MC into areas namely Areas 6, 8 and 9-16. It applied to the Superintendent of Lands
F and Surveys at Mukah for MC for these areas. The plaintiff also applied to renew its GPL on 24 September 2006. The plaintiff bore all the expenses of prospecting for coal although it was the common aim of SESCO and the plaintiff to ensure continuous and stable supply of coal to meet the electrical power requirements of
G the State. However, according to the plaintiff, its prospects started to dim somewhat in the later part of 2005. The chain of events that led to this situation is as follows.

[3] The plaintiff was initially informed by SESCO that it would
H take up 55% of its shares and become the majority shareholder under a new government policy to rationalise and consolidate coal mining in Sarawak. However, this was not to be. On 14 December 2005, the 2nd defendant purported to cancel the existing MC of the plaintiff. However, the cancellation was later
I revoked on 16 July 2007. Nonetheless, the plaintiff by their own admission had continued mining in their designated areas (Areas 1-

4) at all times up to present time. The plaintiff also discovered that Sara Eksklusif Sdn Bhd which is wholly owned by the 1st defendant had been granted a Prospecting Licence (PL) in an area within the plaintiff's GPL area. The directors of Sara Eksklusif Sdn Bhd were the State Financial Secretary (SFS) and one Fabian Chang Tsang Shiung (PW3). The latter wore a number of hats. Fabian Chang was a senior officer of SESCO (Acting CEO of SESCO at one time). He had also been seconded to the plaintiff as a director. In fact he testified on behalf of the plaintiff. He had been seconded to the plaintiff to represent SESCO's interests. He told the court that he had been instructed to become one of the founding directors of the 1st defendant. The 1st defendant was set up under a new government policy known as the Coal Consolidation Policy. In the event, SESCO did not take up majority shares in the plaintiff. Instead, SESCO and SFS Incorporated had formed the 1st defendant to directly participate in coal mining. SFS Incorporated is a corporation established by State Law (State Financial Secretary (Incorporated) Ordinance, Cap. 103, Laws of Sarawak). The plaintiff was informed on 10 June 2007 that its application for MC in Areas 9-16 within its GPL area had been rejected. On 4 July 2007, the plaintiff's application to renew its GPL was rejected as well. However, the main complaint of the plaintiff springs from the following undisputed fact. On 24 March 2008, the 1st defendant was issued with MC over areas known as SE1, SE2, SE3 and BC2. The plaintiff alleges that SE1, SE2 and SE3 are within its GPL area. In this suit, the plaintiff is seeking a declaration that the issuance of the MC to the 1st defendant is null and void on the following grounds:

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1. That the approval of the MC to the 1st defendant was flawed because the approval was dictated by the Permanent Secretary of the Ministry of Planning and Resource Management who had an interest in the 1st defendant.

2. That the 1st defendant did not comply with the provisions of the Mining Ordinance.

3. That the 1st defendant used the Genesis and the Northeast Reports in procuring the MC.

[4] The causes of action relied on by the plaintiff are conspiracy to injure, breach of copyright, breach of confidentiality and breach of statutory provisions. By a later amendment to para. 65A of the statement of claim, the plaintiff expanded the public law flavour of its claim by alleging that the 2nd and 3rd defendants acted *mala fide*, corruptly and without regard to conflict of interests in issuing the said MC to the 1st defendant. The plaintiff actually filed a Judicial Review application to declare null and void the PL and the MC that was granted to the 1st defendant. Unfortunately for the plaintiff, the attempt to nullify the 1st defendant's PL and MC failed. The High Court held that the Minister of Resources and Planning as the decision maker should have been cited as a party. The appeals to the Court of Appeal and the Federal Court did not generate the desired outcome for the plaintiff. Counsel for the 2nd and 3rd defendants argued that the instant suit is *res judicata* because the public law issues properly belonged to the earlier judicial review application. I agree with him that the public law issues in this case belonged to the earlier judicial review application but in my opinion that matter is not *res judicata* as the action was dismissed on a technicality without being heard on the merits.

Evidence Of The Plaintiff's Witnesses

[5] Since the basic facts in relation to the issuance of the GPLs, PLs, MCs, and the incorporation of the 1st defendant are not disputed, I shall briefly outline the evidence of the main witnesses only. Edward Lim (PW1) was the general manager of plaintiff between July 2005 and August 2008. He told the court that the GPL of the plaintiff was not renewed without any reasons being assigned. The plaintiff's application for MC in Areas 9-16 was also rejected without any reason being given. He said that the plaintiff's application had strictly followed the Work Flow Chart issued by the Lands and Surveys Department. At the same time, Sara Eksklusif Sdn Bhd was given a PL in the GPL area of the plaintiff. He conducted a search and discovered that it was wholly owned by the 1st defendant. He said the Permanent Secretary of the Ministry of Planning and Resource Management was a director of the 1st defendant at that time. He said the 1st defendant had procured two crucial employees from the plaintiff, namely Elmer P. Delingquez (deceased) and Kiew Fook Min. The late Elmer P. Delingquez was the mining manager whereas Kiew Fook Min was the data manager who had access to coal exploration information.

Kiew Fook Min was hired as a sub-contractor of the 1st defendant to carry out exploration and pitting. He said that the areas that Kiew Fook Min carried out these works were previously under the GPL area of the plaintiff. Fabian Chang Tsang Shiung was once acting CEO of SESCO. He later became the director and Chairman of the plaintiff. He claimed to have knowledge of the dealings between SESCO and plaintiff. He said that SESCO wanted to ensure continuous supply of coal to its power producing subsidiaries. That was the reason it signed a joint venture agreement with the plaintiff. He referred to the agreement whereby the plaintiff had engaged the Chinese company to verify coal occurrences in its GPL area. He also referred to the production of the Northeast report by the said Chinese company. The plaintiff had hoped to increase its coal production to honour its contractual obligation to PPLS Power Generation Sdn Bhd to supply coal for 25 years. However, the situation changed because of the Coal Consolidation Policy. The State Financial Secretary told the board of SESCO that the Coal Consolidation Policy was a policy of the State Government. Initially, the plan was to increase the equity participation of SESCO in the plaintiff from 15% to 55%. He said that the plan was not implemented because he was directed to form a new company, namely the 1st defendant, in order to implement the Coal Consolidation Policy. The 1st defendant was 80% owned by SFS Incorporated and 20% by SESCO. Fabian Chang Tsang Shiung and the State Financial Secretary became the founding directors of the 1st defendant. The business of the 1st defendant was extraction and selling of coal. Fabian Chang Tsang Shiung's role as founding director was to assist the nascent company to become a full fledged coal company. He seconded Alfred Lai from SESCO to the 1st defendant as the general manager. Alfred Lai then suggested that the 1st defendant should obtain the services of people with experience in the coal mining industry in the Mukah area. He identified one of the experienced staff as the late Elmer P Delinquez who worked for the plaintiff. The late Elmer P. Delingquez was a Mining Engineer who eventually resigned from the plaintiff and took up employment with the 1st defendant. Fabian Chang Tsang Shiung also sought the support of the plaintiff's sub-contractor such as Seri Datai Holdings Sdn Bhd and Modal Sempurna Sdn Bhd. The 1st defendant also appointed Kiew Fook Min who was a former senior employee of the plaintiff

as a sub-contractor. Kiew Fook Min was well versed with the exploration and mining activities of the plaintiff in the Mukah area. Fabian Chang Tsang Shiung said that the 1st defendant wanted to acquire the necessary know-how overnight. According to Fabian Chang, the 1st defendant intended to do coal exploration and mining in the Mukah area because the plaintiff's exploration activities had confirmed the presence of coal in that area. The second reason was that SESCO was planning to set up a power generation plant in Mukah District. PW3 said that the next step was to acquire a GPL and MC to start operations. The 1st defendant did not anticipate any problems because it is a government linked company. In fact, Fabian Chang said that the 1st defendant expected favourable treatment from the State Government and was optimistic that it would get what it asked for. The next witness for the plaintiff was Datu Stephen Wan Tek Kyung (PW4). He was a former managing director of SESCO. He was appointed as the Chairman of the plaintiff from 22 September 2002 to 28 October 2004. He is still a director of the plaintiff. His evidence is similar to that of Fabian Chang. He said the plaintiff was originally intended to be the joint venture company of SESCO and Mega Arif Sdn Bhd. Datu Stephen Wan said that RM1,098,505 was spent prospecting for coal in the Mukah-Balingian area as of July 2003. All expenses were borne by the plaintiff. SESCO did not contribute to this expense. His evidence relating to the application of the GPL extension by SESCO, the subsequent transfer of the GPL to the plaintiff and the issuance of the MC is substantially the same as that of Fabian Chang. In respect of the role of Kiew Fook Min, Datu Stephen Wan said that he had been appointed as the Field Manager for coal prospecting works in the Mukah-Balingian area in 2001. Later, in 2005, Kiew Fook Min was re-designated as Section Head of Data Management. The purpose of the exploration data was to support MC applications as well as for planning mining activities. Kiew Fook Min was entrusted with safekeeping of all exploration data and to prevent unauthorised parties from having access to it. He said that Kiew Fook Min was never given permission to disclose any exploration data to third parties. In his opinion Kiew Fook Min was an important staff of the plaintiff. Datu Stephen Wan was with the plaintiff since the beginning and he knew a lot about its business activities, particularly about coal exploration in Mukah. He said that Kiew Fook Min was also assigned to accompany the

Chinese company officers in the Mukah area when they conducted the coal occurrence verification exercise. He also referred to the role of the late Elmer P Delinquez. He said that the late Elmer P. Delingquez was appointed as the Chief Mining Engineer and in that capacity was privy to all technical information relating to the plaintiff's exploration and mining activities. He said that the late Elmer P. Delingquez was also not given permission to share confidential information with third parties. However, the late Elmer resigned from the employ of the plaintiff on 1 May 2006 and subsequently joined the 1st defendant. In respect of the Coal Consolidation Policy, Datu Stephen Wan said that he heard of it through SESCO's letter but could not recall any Minister making a public statement of such a policy. He said that he was never informed about any valuation or due diligence exercise in relation to SESCO's proposed takeover of 55% of the share of the plaintiff from Mega Arif Sdn Bhd. All that he knew was that the MC of the plaintiff was cancelled and its GPL in Mukah was not extended. The 1st defendant was then given MC and GPL in the areas that the plaintiff had applied for. The last witness of the plaintiff was Datu Wan Alwi bin Wan Hashim (PW5), the Permanent Secretary of Planning and Resource. He was a subpoenaed witness. Counsel for the plaintiff did not declare him as a hostile witness and therefore was unable to put leading questions to him. Datu Wan Alwi bin Wan Hashim agreed that he was also a director of the 1st defendant. He said that the 1st defendant was part of the Coal Consolidation Policy whereby a government linked company was required to sell coal to SESCO so that the supply of coal is assured and the price is reasonable.

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Case For The Defence

[6] The defence of the 1st defendant can be briefly stated as follows. The 1st defendant denied the charge of conspiring with the other two defendants or their officers to injure the plaintiff. The 1st defendant averred the GPL of the plaintiff was a "general" prospective licence and that there was nothing wrong if Sara Eksklusif Sdn Bhd or the 1st defendant were granted PL or MC in the same area. The plaintiff did not have exclusive rights to the area under their GPL. The 1st defendant also denied breaching the copyright of the plaintiff in the Genesis Report and Northeast Report. The 1st defendant's case is that these reports are in the public domain as they were published by the

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A Department of Mineral and Geosains. They called Dorani bin Johari (DW9) and Sia Say Gee (DW1) who testified that the Genesis Report and the Northeast Report contained 95% of their published work. Dorani bin Johari said that almost the entire Genesis Report was plagiarised from his work with Sia Say Gee.
B Incidentally, Dorani bin Johari had left the Department of Mineral and Geosains to work for the 1st defendant and became its acting General Manager. In respect of the allegation of procuring the services of the plaintiff's employees, the 1st defendant's defence is that Kiew Fook Min was sacked whereas the late Elmer P.
C Delingquez left with the knowledge and acquiescence of the plaintiff. After Kiew Fook Min left the employ of the plaintiff, he became a sub-contractor of the 1st defendant and was not an agent of Sara Eksklusif Sdn Bhd. Kiew Fook Min who was called as a witness said that he had no access to confidential
D information. He was called Data Section Head in name only. In truth he was put in cold storage. He was tasked to assist the Chinese team because he was able to act as their translator in Mukah. He only had access to raw data and had no access to the Genesis or Northeast report. Kiew Fook Min said that he and
E 30 other employees were terminated by the plaintiff on 25 January 2006 and he filed an action for wrongful dismissal at the Industrial Court.

[7] The defence of the 2nd and 3rd defendants is that the MC
F issued to the 1st defendant was in compliance with the applicable laws and regulations. In respect of the Genesis and Areas Report, they denied making them available to third parties. The 2nd and 3rd defendants also denied conspiring with the 1st defendant to injure the plaintiff. The present Director of the Lands and
G Surveys, Datu Sudarsono bin Osman (DW11) testified that all applications and supporting documents that were submitted to his department were given confidential treatment. They were not released to third parties. Datu Sudarsono denied that he conspired with the 1st defendant to injure the plaintiff although he
H was appointed as a director of the 1st defendant. However, he did not consider the issuance of a mining lease to the 1st defendant as a conflict of interests as it was a decision made by the State Cabinet. He said the issuance of the MC in SE1, SE2 and SE3 was consequent to the 1st defendant having already
I been issued with ML over the areas in question.

Issues

(1) Whether The Plaintiff Should Have Proceeded By Way Of Judicial Review?

[8] From the evidence, the following facts are not disputed. The plaintiff's MC had been cancelled and later restored. The plaintiff's GPL was not renewed. The 1st defendant had been issued a PL, a ML and a MC. The MC is for areas SE1, SE2 and SE3. At the same time, the plaintiff's application for MC in areas 9-16 was rejected. The case of the plaintiff is that the MC of the 1st defendant is within their GPL. The remedies that the plaintiff seeks can be divided into two categories:

1. A declaration that the MC granted to the 1st defendant is null and void.

2. Declaration, injunction and account of profits made in relation to the claim of breach of copyright of the Genesis, Northeast and Areas reports and conspiracy to injure the plaintiff.

[9] Counsel for the 1st defendant submitted that the prayer for a declaration to nullify the MC granted to the 1st defendant is in effect a challenge against the decision of a public authority and therefore the plaintiff should have proceeded by way of judicial review under O. 53 of the Rules of the High Court 1980. Counsel for the plaintiff responded that the plaintiff has also based his action on the private law tort of conspiracy and breach of copyright. The underlying reason to prevent challenges to decisions of public authorities other than by way of judicial review was explained by Lord Diplock in the famous case of *O'Reilly v. Mackman* [1982] 3 All ER 1124 as follows (cited in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865):

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

[10] The grounds of the plaintiff in seeking to nullify the issuance of the MC to the 1st defendant can be summed up as follows:

A 1. That the 2nd defendant was the issuing authority in respect of the MC.

2. That he held a directorship in the 1st defendant.

B 3. He had placed himself in a conflict of interest position by acting in favour of the 2nd defendant.

4. That he took a direction or dictation from the Permanent Secretary of the Ministry of Planning and Resource Management.

C 5. The said Secretary was also a director of the 1st defendant.

[11] The preliminary question that the court should ask to determine whether a matter can fall under O. 53 was stated in the D landmark Federal Court decision of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 in the following terms:

> In view of this, let us begin by first asking ourselves a preliminary E question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate)? If his complaint is not amenable for judicial review then there is no dispute as to the procedure adopted since he is at liberty to commence his action by way of writ or originating summons. So first we have to determine the F parameters of matters which are amenable for judicial review.
>
> [22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and G the nature of the decision made; whether the decision was made under a statutory power (see para. 61 *Halsbury Laws of England*, 4th edn, 2001 Reissue, vol. 1(1)).

[12] In the instant case, there is no dispute that the 2nd defendant is a public authority and that he had issued the MC to H the 1st defendant in the purported exercise of his statutory power under the Mining Ordinance. He explained in court that the ML was approved by the State Cabinet and that the issuance of the MC was consequent to that decision. The plaintiff had alleged that the MC was issued for areas (SE1, SE2 and SE3) which I were within its GPL area. In fact the plaintiff had commenced judicial review action (JR 06-III-2007, Kuching High Court) to challenge the decision of the 2nd defendant to:

1. To refuse MC to the plaintiff on 10 June 2007 in areas 9-16. A

2. To refuse renewal of the plaintiff's GPL on 4 July 2007.

[13] The application was dismissed on the ground that the Minister of Planning and Resource Management was not made a party to the application. In the instant application, the plaintiff has sued the defendants for a declaration that the issuance of the MC in areas SE1, SE2 and SE3 which are located in its former GPL area was null and void for the reasons I cited earlier. In my opinion, counsel for the 1st defendant is correct to submit that the application of the plaintiff to nullify the MC granted to the 1st defendant falls squarely within the realm of public law. The MC was issued to the 1st defendant by the 2nd defendant pursuant to the discretionary powers conferred on him by statute. The grounds which the plaintiff invoked to nullify the issuance of the MC, ie, conflict of interests, corrupt motive, *mala fide* etc clearly belong to public law. Counsel for the plaintiff argued that the claims based on the tort of breach of copyright and conspiracy arises from private law. Counsel for the 1st defendant submitted they are not addressing this part of the claim in their objection. The question that arises here is whether by lumping private law causes of action, the plaintiff can circumvent the general rule that challenges to a decision of a public authority pursuant to statute must be by way of judicial review. In *O'Reilly v. Mackman (supra)*, Lord Diplock cited the exceptions as follows: B C D E F

> .... there may be exceptions, *particularly where the validity of the decision arise as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law,* or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis: (emphasis added) G

[14] In my opinion, the plaintiff's writ action to impugn the decision of the 2nd and 3rd defendants cannot fall under the above exception for the following reasons. The avowed grounds of the plaintiff to impugn the decision of the 2nd and 3rd defendants to issue MC to the 1st defendant are that the issuing authority acted in a conflict of law situation with a corrupt motive and with *mala fide*. This is a typical public law argument. As stated in the *Ahmed Jefri* case, the preliminary question that needs to be asked H I

A is whether the plaintiff's grievance could have proceeded by way of judicial review. In order to answer this question, the court must consider whether there is sufficient public law element in the decision made. The answer to this question is obvious. The 2nd and 3rd defendants had exercised their powers under statute to B issue the MC to the 1st defendant. In fact, the plaintiff himself had earlier challenged by way of judicial review the refusal of the 2nd and 3rd defendants to grant them the extension of GPL and a fresh MC. The primary remedy that the plaintiff seeks is to declare null and void the MC of the 1st defendant which was C issued in the plaintiff's former GPL area. However, in my opinion, it cannot be said that the validity of the decision of the 2nd and 3rd defendant to issue MC to the 1st defendant arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law. The plaintiff's remedy against all the D defendants for the infringement of the copyright and the tort of conspiracy to injure is damages and an account of profits. If the court finds that the MC was issued to the 1st defendant in breach of prevailing laws and regulations, it can be nullified regardless of any finding in favour of the plaintiff in the breach of E copyright and conspiracy actions. Therefore, one is hard put to consider the validity of the decision of the 2nd and 3rd defendants to issue MC to the 1st defendant as a collateral issue that arises from the plaintiff's claim of breach of copyright and conspiracy. The claim under the above mentioned torts could have been F pursued separately. For this reason also, the inference that the plaintiff amended the statement of claim to include para. 65A to challenge the issuance of the Mining Certificate on public law grounds because of the failure of the judicial review action on 12 August 2008 cannot be avoided. Finally, it cannot be said that G the defendants consented to the writ application as they objected by taking out a striking out application. In conclusion, the plaintiff's action to nullify the MC issued to the 1st defendant has substantive public law element and it does not come within any of the general exceptions enunciated in *O'Reilly v. Mackman* H *(supra)*. The action of the plaintiff under para. 65A to nullify the decision of the 2nd and 3rd defendants should therefore be dismissed. However, assuming that I am wrong in ruling that the plaintiff should have proceeded by way of judicial review, I shall now proceed to consider the case of the plaintiff to nullify the MC I issued to the 1st defendant on its merits.

Whether Plaintiff Entitled To Nullify MC Issued To 1st Defendant?

[15] The mainstay of the plaintiff's case to nullify the MC issued to the 1st defendant is that Datu Sudarsono bin Osman (the Director of the Land and Survey Department) and Datu Wan Alwi bin Wan Hashim (Permanent Secretary to the Ministry of Planning and Resources Management) were directors of the 1st defendant. Counsel for the plaintiff submitted that their decision in issuing the MC to the 1st defendant and at the same time refusing the application of the plaintiff was tainted by corrupt practice and *mala fide*. In my opinion, there is no evidence to support the above allegations. The defendant's witnesses, whose evidence I referred to earlier, testified unchallenged that the Sarawak Government had formulated a new policy on coal, namely the Coal Consolidation Policy. The purpose of the Coal Consolidation Policy was to ensure stable supply of coal at a reasonable price over a long period. Coal was considered an important resource because it was used to generate electrical power in Sarawak. The plaintiff's witnesses acknowledged the existence of this policy. One of their witnesses, Fabian Chang Tsang Shiung even admitted the Coal Consolidation Policy has a noble objective and was meant to benefit the people. The plaintiff's witnesses testified that they had first thought the Sarawak Government would acquire a majority stake of the plaintiff's shares. Only later the plaintiff realised that the 1st defendant which is 80% owned by the State Government and 20% by SESCO would directly participate in coal mining. As submitted by Counsel for the 1st defendant, no conflict of interest or corrupt motive can be attributed to the fact that Datu Sudarsono bin Osman and Datu Wan Alwi Wan Hashim were appointed as directors of the 1st defendant. Datu Sudarsono bin Osman and Datu Wan Alwi bin Wan Hashim are senior government officers who were appointed to represent the interests of the government in the 1st defendant. The Coal Consolidation Policy is a policy of the Sarawak Government. It is not the function of the court to interfere in a government policy unless the actions taken in pursuance of the policy had breached prevailing laws. In the instant case, no evidence was given by the plaintiff's witness that Datu Sudarsono bin Osman or Datu Wan Alwi bin Wan Hashim had received any benefit from the issuance of the MC to the 1st defendant. Their evidence that they were

appointed to the board of directors of the 1st defendant by virtue of their position to represent the interest of the government was not rebutted. In the premises, the allegation of abuse of power, corrupt motive and *mala fide* on their part in participating in the decision of the government to issue MC to the 1st plaintiff is unfounded. Counsel for plaintiff has also failed to cite any provision of the Mining Ordinance of Sarawak (1958) that had been breached by the issuance of the MC and ML to the 1st defendant. Although the plaintiff held a GPL in the areas in question, their counsel did not cite any law to argue that the government cannot issue a MC and ML in any of these areas to other coal prospectors. As the name implies, the GPL issued to the plaintiff is "general" in nature and not "exclusive". A GPL is issued under s. 40 of the Mining Ordinance of Sarawak (1958) to carry out general prospecting of minerals in an extensive area. The original GPL held by SESCO covered an area of 92 sq.km. An EPL or Exclusive Prospective Licence is issued under s. 45 over a definite area. It is not the plaintiff's case that they were issued with EPL over the areas where the 1st defendant had been granted a MC. There is nothing in the Mining Ordinance of Sarawak (1958) or the Mining Rules made under it that states that the government is obliged to issue a MC and a ML to the plaintiff in its GPL area. For this reason, the plaintiff cannot argue that they had a legitimate expectation of being issued with an MC in their GPL area. A separate application for MC and ML is necessary under ss. 10 and 32 of the Mining Ordinance 1958. Furthermore, there is also no provision in the Mining Ordinance of Sarawak (1958) or Mining Rules that prevents the issuance of a PL or MC to the 1st defendant in the GPL area of the plaintiff.

[16] To further support the legitimate expectation argument, counsel for the plaintiff referred to the agreement with a SESCO subsidiary (PPLS Power Generation Sdn Bhd) to supply coal for 25 years. Furthermore the plaintiff had engaged a Chinese company to verify and confirm coal occurrences in other areas apart from its existing MC area. The coal supply in the plaintiff's existing MC area was fast depleting at that time and the plaintiff wanted to honour its agreement under the said agreement by sourcing coal from new areas under its GPL. However, it must be noted that the 2nd defendant had nothing to do with the plaintiff's dealings with the SESCO's subsidiary for supply of coal. Therefore there was no direct relationship between the 2nd

defendant and the plaintiff in respect of the alleged legitimate expectation. In *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821, Abu Samah Nordin JCA considered the absence of a direct relationship between the aggrieved person and the decision maker as fatal. He said as follows:

> A common trait in all these cases is that the aggrieved parties stand in direct relationship – without any go-between – with the decision makers. The expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action,* 5th edn. paras 8-37.

[17] Therefore, the coal supply agreement could not have created a legitimate expectation that the plaintiff would be successful in its application for MC in other areas.

[18] In conclusion, the case of the plaintiff to nullify the MC granted to the 1st defendant on public law grounds set out in para. 65A of the amended statement of claim fails on the merits as well.

Whether The Defendants Breached The Copyright Of The Plaintiff?

[19] This claim arose in the following manner. As stated in the summary of facts, the plaintiff had produced two reports (the Genesis Report and the Northeast Report) on coal exploration in its GPL area. During the trial, the plaintiff also alleged that its copyright to a third report, ie, the Areas Report, was breached. However, as this report was never disclosed in the bundle of documents, it would not be proper to consider the copyright claim in respect of it. In its coal exploration and coal mining works, the plaintiff claimed to have employed two key employees, ie, Kiew Fook Min and the late Elmer P Delinquez. Kiew Fook Min was directly employed by the plaintiff. The plaintiff carried out actual mining work through its sub-contractors and the late Elmer P. Delingquez was employed by them. The allegation of the plaintiff is that the 1st defendant made use of the confidential information from the two reports in their coal exploration and mining works. The plaintiff further alleged that by employing Kiew Fook Min as a sub-contractor and the late Elmer P. Delingquez as its mining

engineer, the 1st defendant had used confidential information that belonged to the plaintiff, especially about coal occurrences in its GPL area. The plaintiff also accused the 2nd and 3rd defendants of making available the said reports to the 1st defendant.

[20] The first issue that must be addressed is whether the plaintiff possessed copyright over the Genesis and Northeast Reports. The plaintiff bears the burden to establish copyright over these reports. The 1st defendant called two witnesses who testified that 95% of the Genesis Report had been plagiarised from their own work. Sia Say Gee testified that while working as a senior geologist at the Department of Minerals and Geosains, he authored a report known as Evaluation of Coal Resources in the Mukah Coalfield. His supervisor, Dorani bin Johari, edited the said report and was credited as a co-author. The said report was also known as the DMG, JMG or Sia/Dorani Report. Dorani bin Johari was Deputy Director of Minerals and Geosains when the said DMG report was prepared by Sia Say Gee. Dorani bin Johari subsequently joined the 1st defendant as its Acting General Manager. Dorani bin Johari said that the DMG report was compiled by Sia Say Gee over a period of seven years from 1994 to 2000 under his guidance and supervision. The 1st defendant used the DMG report and maps publicly available from the Department of Minerals and Geosains to prepare an exploration report to support its application for ML and MC. Dorani bin Johari had no access to the Genesis Report prior to the trial but having read it, he realised that 95% of it was copied from the DMG report that he had co-authored with Sia Say Gee. He said that even the maps and tables in his DMG report were lifted and reproduced in the Genesis Report. This is what he said:

> Q: Can you explain why you say that the Genesis Report is plagiarized from your DMG report? Witness is shown both the Genesis and DMG reports and asked to point out what he means.
>
> A: After going through and comparing both reports, paragraph by paragraph, the only new material in the Genesis Report are the synopsis, paragraphs 1.2, 1.7, 3.1, 3.2, 4.2, 5, 9 and conclusion. Everything else is identical. Even all the tables, figures and maps were taken from the DMG Report. The new materials are all general matters which are of no use to the 1st Defendant even if I had access to the Genesis Report (which I did not) when I was preparing the 1st Defendant's exploration report.

[21] Dorani bin Johari's evidence, if accepted as true, means that the Genesis Report is not an original work. He had taken the trouble to compare his own work and the Genesis Report which was discovered for the purpose of the trial before giving his opinion on the originality of the latter work. Very surprisingly, the plaintiff who is claiming that the Genesis Report was used by the 1st defendant did not call its authors to support their claim that the said report was an original work. Datu Stephen Wan, the general manager of the plaintiff referred to the Genesis Report but he admitted that he did not even read and compare the DMG report with the Genesis Report. This is what he said during cross-examination:

Q: Are you aware that this JMG Report is an official document from the Jabatan Mineral dan Geosains ("JMG")?

A: I am not aware of that.

Q: You said preparation of Genesis Force report not fast in 2 months because you had existing data to refer to. Do you agree that almost 90% of the Genesis 5 Report is word for word a reproduction of the JMG report?

A: I have not compared the two reports.

[22] Datu Stephen Wan also admitted that he never read the 1st defendant's exploration report which was submitted to the relevant authorities. He said as follows:

Q: Have you read through the contents of the exploration report prepared by Sarawak Coal Resources ("Sarawak Coal Resources Report") in support of its application for ML (Tab 4 1st Defendant's bundle of documents)?

A: I have not seen it before.

Q: Are you sure not seen it before?

A: Yes.

Q: Refer to statement of claim paragraphs 55, 58 and 65 (d). Genesis Force is claiming that Sarawak Coal Resources stole Genesis Force's secret information and used it for Sarawak Coal Resources exploration report. But you, as MD of Genesis Force, have not read the Sarawak Coal Resources Report?]

A: It was not available to me.

A Q: You do not know what is inside the Sarawak Coal Resources report?

A: I have not read the report.

[23] This is an astonishing admission in view of the claim for B breach of copyright by the plaintiff. In the premises, Datu Stephen Wan was in no position to refute the defence of the 1st defendant that the Genesis Report was plagiarised from the DMG Report. I have perused the said two reports and as counsel for the 1st defendant submitted, I found that the sentence structure of C numerous passages is uncannily similar or identical. Having considered the evidence of Dorani bin Johari who was not challenged in any significant manner by cross-examination or by the evidence of the plaintiff who did not call the purported authors of the Genesis Report to the witness stand, I find on a D balance of probabilities that the plaintiff has failed to prove copyright over the said report.

[24] Even if the plaintiff had proved that the Genesis Report was their original work, I find that the plaintiff completely failed to E prove that the defendants had infringed their copyright of it. My reasons are as follows. The plaintiff did not tender any evidence to prove that the 1st defendant was in possession of the Genesis Report and had used the same for coal exploration purposes. It is apparent that the plaintiff speculated that the 1st defendant would F have got the report from the office of the Superintendent of Lands and Surveys of Mukah Division. The plaintiff did not produce any witness who could say that the Genesis Report had been given to the 1st defendant. The 2nd and 3rd defendants however, called the Superintendent of Lands and Surveys of Mukah Division, G Unus bin Tambi (DW10) to the witness stand. Unus bin Tambi emphatically stated that disclosure of reports that accompany MC applications to third parties are prohibited and is against department policy. His testimony on this point was unrebutted. As attested by Dorani bin Johari, I also find that the Genesis Report H would not have assisted the 1st defendant. All the relevant information in respect of coal occurrences in the Mukah area inside the Genesis Report was already referred to in the DMG report which was co-authored by Dorani bin Johari. In the premises, it begs belief why the 1st defendant would want to use I a second hand report.

[25] In respect of the Northeast report, Dorani bin Johari testified that it covered only about 10% per cent of the coal occurring areas in Mukah. He also said that the report did not give any ISO maps or specific locations and was therefore useless for purpose of coal exploration. The plaintiff did not produce the authors of the Northeast report or any other witness to prove the utility and value of this report for coal exploration purposes. As a result, the testimony of Dorani bin Johari stands unchallenged. I see no reason not to accept his testimony on this point. He had co-authored the DMG report which covered the Mukah area extensively and gave rebutted evidence that he had extensive knowledge of coal occurrences there. For this reason, it is highly improbable why the 1st defendant would want to use the Northeast Report which does not give location maps of coal occurrences. Again the plaintiff did not give any evidence that the 1st defendant was in possession of the Northeast Report. However, their witnesses pointed out that their former employee, Kiew Fook Min was employed by the 1st defendant. The plaintiff had suspected that Kiew Fook Min could have leaked confidential information from the Northeast Report. However, the suspicion against Kiew Fook Min was not substantiated. There is no evidence that Kiew Fook Min had access to the Northeast Report or the information contained in it. Datu Stephen Wan did not even know what exactly Kiew Fook Min did at the Data Section of the Kuching office of the plaintiff. Kiew Fook Min testified that he did not prepare the Northeast Report and would have been unable to interpret the data contained in it as he was not a geologist. He also said that he only acted as a translator to the Chinese company officials who collated the data in the Northeast Report. In the premises, the plaintiff failed to prove on a balance of probabilities that Kiew Fook Min had access to the Northeast Report and had leaked confidential information from the Northeast Report to the 1st defendant. For the above reasons, I find that the plaintiff has failed to prove the cause of action based on breach of the copyright of the said reports.

A B C D E F G H

Conspiracy To Injure

[26] I shall first direct myself on the law regarding the tort of conspiracy to injure. In *Yap J.H. v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243, Mohamed Dzaiddin J (as he then was) cited the following well-known

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A passage from the judgment of Lord Diplock in the House of Lords case of *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* [1981] 2 All ER 456 on the civil tort of conspiracy:

> My Lords, conspiracy in a criminal offence has a long history. It consists of 'the agreement of two or more persons to effect an unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is completed if there is such agreement, even though nothing is done in pursuance of it.' I cite from Viscount Simon LC's now classic speech in *Crofter Harris Woven Harris Tweed Co. Ltd. v. Veitch* [1942] 1 All ER 142 at p. 146, [1942] AC 435 at 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted, the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

[27] Mohamed Dzaiddin J (as he then was) then proceeded to describe the elements of the tort of conspiracy as follows:

> In order to make out a case of conspiracy, the plaintiff must establish (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff (*Halsbury's Laws of England*, 4 edn., Vol. 45, para. 1527). Damage is an essential element and where damage is not pleaded, the statement of claim may be struck out – *Ward v. Lewis* [1955] 1 All ER 55 at p. 56, 57. Finally, the acts done which resulted in damage must be without lawful justification or excuse. (*Crofter Harris Tweed Co. Ltd. v. Veitch* [1942] 1 All ER 142.)

[28] In para. 64 of the statement of claim, the plaintiff has pleaded that the 1st defendant induced their employees to leave the plaintiff's employ. During the trial, the employees in question were identified as Kiew Fook Min and the late Elmer P. Delingquez. The plaintiff also pleaded that at the same time their GPL was not extended and the 1st defendant was granted mining rights in their GPL area. The plaintiff further pleaded that the defendants had planned the destruction of their coal mining business. It is my finding that the plaintiff failed to prove the tort of conspiracy on the part of the defendants. My reasons are as follows.

[29] There is no evidence that the defendants acted in concert to do any damage to the plaintiff. I shall first address the allegation that Kiew Fook Min and the late Elmer P. Delingquez were induced to leave the employ of the plaintiff. Kiew Fook Min testified in court that he was not induced to leave the plaintiff but that his services and that of 30 other employees were terminated. Kiew Fook Min and the others had filed a case for wrongful dismissal at the Industrial Court. Prior to being dismissed, Kiew Fook Min said that he was put in "cold storage" at the Kuching office. The plaintiff's witnesses did not deny that the service of Kiew Fook Min was terminated. Fabian Chang Tsang Shiung, the acting CEO of the plaintiff said as follows during cross-examination when challenged that Kiew Fook Min was sacked:

Q: 8(a): Are you aware that Kiew's employment was terminated by Genesis Force?

A: I was aware of at some point in time but do not know at what point.

Q: Are you aware that he was upset and took Industrial Court action against Genesis Force?

A: Not aware.

[30] Datu Stephen Wan, the general manager virtually conceded that Kiew Fook Min had to leave the plaintiff because of some "re-organisation". He said as follows during cross-examination:

Q: I now refer you to your answer 7 (a to d). You have produced an employment letter for Kiew. Was Kiew's employment terminated by Genesis Force?

A: From memory, we did some re-organisation and he was offered post by subcontractor because Genesis Force not directly involved in mining.

Q: Since Genesis Force not doing work directly and Kiew was offered a job by your subcontractor, would you agree that Kiew no longer had any job at Genesis Force?

A: I cannot remember the full details of the re-organisation.

[31] Datu Stephen Wan refused to answer a direct question whether Kiew Fook Min resigned but continued to speak in waffling language as follows:

A Q: So Kiew did not resign from Genesis Force?

A: As mentioned I am not clear whether he resigned or what, technically I do not know.

Q: Therefore you agree that he was not asked by Sarawak Coal
B Resources to resign from Genesis Force and go over to Sarawak Coal Resources?

A: I have no knowledge of that.

[32] Despite Datu Stephen Wan's best efforts at being equivocal,
C it is obvious from his own answers that Kiew Fook Min did not leave the plaintiff voluntarily but was forced to do so. The argument of the plaintiff that Kiew Fook Min was induced to leave and work for the 1st defendant is therefore bereft of any foundation. The plaintiff also failed to prove that Kiew Fook Min
D could have taken any confidential information with him. Datu Stephen Wan, despite being the general manager of the plaintiff could not give a straight answer whether Kiew Fook Min was in possession of confidential information. In fact he did not know what Kiew Fook Min did at the Data Section of the plaintiff's
E Kuching office. Datu Stephen Wan said as follows during cross-examination:

Q: Refer to statement of claim paragraph 65(e). Is Kiew one of the employees that the plaintiff says Sarawak Coal Resources procured to leave Genesis Force to go over to work for
F Sarawak Coal Resources with confidential information?

A: I have no knowledge of this, I am not involved in the wording of 65(e). I know this people with us and they took over.

G Q: Is Kiew one of them, that the defendant induced to break contract of employment?

A: I do not know whether he is an employee in the transition period and the circumstances he left company.

H **[33]** The plaintiff's general manager's inability to state categorically that the 1st defendant had induced Kiew Fook Min who possessed confidential information to cross over to their side speaks volumes of the strength of their case. The plaintiff also failed to prove that their mining engineer, the late Elmer P.
I Delingquez was induced to leave their employ by the 1st

defendant. It appears that there was nothing surreptitious or conspiratorial about the manner he changed employers. Fabian Chang, who was Acting Chief Executive Officer of the 1st defendant, chaired a meeting on 7 March 2006 at which a decision was made for the late Elmer P. Delingquez to leave the plaintiff and join the 1st defendant. At that time, Fabian Chang was also a director of the plaintiff. Fabian Chang agreed during cross-examination that the late Elmer P. Delingquez's eventual employment with the 1st defendant was discussed at the plaintiff's board meeting. However he was not sure whether the late Elmer P. Delingquez left before the expiry of his work permit with the plaintiff or after. The minutes of the meeting held on 7 March 2006 which was tendered in evidence also showed that the representatives of plaintiff's mining sub-contractors, Seri Datai and Modal Sempurna agreed to the release of the late Elmer P. Delingquez to work for the 1st defendant. This meant that the plaintiff had acquiesced to the transfer of the late Elmer P. Delingquez to the 1st defendant. The plaintiff also did not tender any evidence to the effect that the late Elmer P. Delingquez left their employment with confidential information which was used by the 1st defendant for the purpose of coal exploration in Mukah, especially in the areas they were granted MC. By all accounts, the late Elmer P. Delingquez was employed in mining works and not exploration. It is also unlikely that the late Elmer P. Delingquez would have used such confidential information for the benefit of the 1st defendant as the plaintiff, through Fabian Chang, had acquiesced to his departure. The plaintiff has therefore failed to prove that the late Elmer P. Delingquez and Kiew Fook Min were induced to leave the employ of the plaintiff.

[34] The plaintiff has also pointed a finger at the 2nd and 3rd defendants in their attempt to prove the tort of conspiracy to injure. The plaintiff however completely failed to prove that the 1st defendant and the 2nd and 3rd defendants acted in concert to damage their mining business. The tort of conspiracy to injure requires the participation of more than one person to act in concert to harm another. The obvious link between the defendants is that the 2nd defendant is a director of the 1st defendant. The other link is that the 1st defendant is a government owned company. However, as I said earlier when dealing with the claim under public law for declaratory orders, there is nothing sinister or unusual about the 2nd defendant being a director of the 1st defendant. The 2nd defendant told the court that he was a

director purely by virtue of his office as the 1st defendant was a government owned – company. He denied receiving any remuneration for representing the government on the board of the 1st defendant. The other senior officers also denied receiving any remuneration for being directors of the 1st defendant by virtue of their public office. The witnesses for the 2nd and 3rd defendants had also explained that the reason the 1st defendant and Sara Eksklusif Sdn Bhd was set up was because the Sarawak Government had formulated a new Coal Consolidation Policy which meant that they wanted to directly participate in coal mining. The Coal Consolidation Policy was not a secret policy as the plaintiff was aware of it. The plaintiff did not adduce any evidence to prove that the 1st defendant had acted in concert with the 2nd and 3rd defendants to ensure that the plaintiff's GPL was not renewed. Learned counsel for the 2nd and 3rd defendants also raised an important legal point in respect of the allegation of conspiracy. It is as follows:

[35] In para. 64 of the statement of claim, the plaintiff pleaded that "individual" defendants conspired with the predominant purpose of injuring the plaintiff. The particular acts committed in furtherance of the conspiracy are listed in paras. 65 and 65A which I referred to earlier. It includes procuring the employees of the plaintiff to work for the 1st defendant, non-renewal of the GPL of the plaintiff, rejecting the application of the plaintiff for MC in areas 9-16 and granting MC and PL to the 1st defendant in areas SE1, SE2 an SE3. The plaintiff pleaded the following fact to buttress the conspiracy claim. The 2nd defendant who is the issuing authority for some of the licences required for mining works was at the same time a director of the 1st defendant who was in the business of coal mining. The plaintiff's suggestion is that the 2nd defendant must have acted improperly in rejecting the MC applied for by the plaintiff in areas 9-16 and granting the MC applied by the 1st defendant. The plaintiff also argued that the 2nd defendant acted pursuant to a direction or dictation of the Permanent Secretary of the Ministry of Planning and Resource Management. The point raised by counsel for the 2nd and 3rd defendant is that the tort of conspiracy can be committed only by individuals and in this case, the plaintiff pleaded that "individual" defendants were responsible. The plaintiff subpoenaed Datu Wan Alwi who is the Permanent Secretary of the Ministry of Planning and Resource Management to testify on the decision making

process of the 2nd and 3rd defendant. Datu Wan Alwi and Datu Sudarsono bin Osman, the Director of the Lands and Surveys Department were examined at length by the plaintiff on the decision-making process of the government and the Coal Consolidation Policy. None of these individuals were cited as defendants. In my opinion, counsel for the 2nd and 3rd defendant is correct to argue that the failure to cite any individual public servant as a co-conspirator in this action is fatal. In the case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, the Federal Court held that in a claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability be established before the Government can be made liable vicariously as the principal. In the instant case, the plaintiff only cited the post held by Datu Sudarsono bin Osman, ie, Director of Lands and Surveys, Sarawak as a defendant. In the above cited case, the Federal Court said as follows:

> Therefore, on the proper construction of ss. 5 and 6 of Act 359, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability be established before the Government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government.
>
> In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. None of the Governments sued is capable of committing the wrong pleaded. Since the Governments' liability in tort can only be vicarious by virtue of ss. 5 and 6 of Act 359, and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Governments as primary tortfeasors. That being so, the appellants' application to strike out the respondents' actions is meritorious.

[36] My reading of the decision in the above-mentioned case is that the relevant officer must be sued in his personal capacity and not merely identified by the post he held at the material time. Since the action against the 2nd and 3rd defendant is flawed because individual government officers were not cited as

defendants, the action against the 1st defendant should also fail as the tort of conspiracy by definition requires the agency of more than one person. On this ground also, the claim of the plaintiff grounded on the tort of conspiracy against the defendants should fail.

[37] In conclusion, for all the above reasons, the plaintiff's claim against all the defendants is dismissed with costs.

Counterclaim

[38] The 1st defendant has been issued with MC in four areas, namely SE1, SE2, SE3 and BC 2 in the Mukah-Balingian area. This is not disputed by the plaintiff. The map of the 1st defendant's areas is annexed to their MC. The three areas are shaded in pink. The 1st defendant's complaint in the counterclaim is that the plaintiff's sub-contractor had carried out mining works in areas SE1 and SE3. The 1st defendant's witnesses tendered five photographs taken in five areas (marked as areas D, E, F, G and H) that depict mining works. The 1st defendant tendered evidence to prove that Areas H and D are in SE1 and Area F is in SE3.

[39] Stamford Sereth Muroh bin Albert (DW2), a surveyor in the employ of the 1st defendant testified that he went to Area SE3 on 14 August 2008. He said that the lorries that transported coal out of this area bore the logo of the plaintiff. He also saw equipment that bore the logo of the plaintiff's sub-contractor, ie, Sri Datai. Stamford Sereth Muroh bin Albert did not go to Area SE3 alone but was accompanied by two other staff of the 1st defendant (Bakar ak Jelenggai and Hanapie bin Zaini, DW3) and four enforcement unit staff from the Land and Survey Department of Mukah Division. He was sure that he was in Area SE3 because he verified his position by using a handheld GPS device. He said as follows:

> Q: How did you know for sure that you were at the 1st defendant's area SE3?
>
> A: I am the surveyor who plotted the map of the 1st defendant's mining areas using AutoDesk Land Desktop 2007 software. When we went to SE3 on 14 August 2008, I verified the location by using my handheld GPS device to verify its GPS coordinates.

[40] Counsel for the plaintiff did not challenge the testimony of Stamford Sereth Muroh bin Albert in respect of the verification of his position in Area SE3 by means of a GPS device. Stamford Sereth Muroh bin Albert was, however, cross-examined on the description of the plaintiff's logo:

Q: And you said that "marked with plaintiff logo", can you be more specific?

A: Printed on yellow A4 paper, with a circle, inside circle is written "GF".

[41] He also identified the logo of Sri Datai on the arm of the excavator in the photograph taken at that area. During cross-examination, Stamford Sereth Muroh bin Albert also said that he saw the plaintiff's lorries transporting coal from the 1st defendant's Area SE3 to Mukah everyday when he did survey work. His evidence is as follows:

Q: Can you remember when you saw these lorries?

A: We do survey everyday and we saw lorries everyday on their way to Mukah.

Q: You mean on the road to Mukah?

A: Selangau - Mukah road.

Q: Did you stop any of these lorries to talk with the driver?

A: No.

Q: You suspected that these lorries were taking coal from SE3, is that correct?

A: Yes

[42] Hanapie bin Zaini, a geological assistant employed by the 1st defendant, gave evidence to corroborate Stamford Sereth Muroh bin Albert's testimony. He said that he drove with Stamford Sereth Muroh bin Albert to Area SE3 on 14 August 2008. He saw excavators loading coal onto lorries. However he did not say why he was certain that he was in Area SE3. One of the enforcement officers from the Lands and Surveys Department of Mukah Division who accompanied Stamford Sereth Muroh bin Albert to Area SE3 on 14 August 2008 was Hamezi bin Luli

(DW5). He corroborated the evidence of Stamford Sereth Muroh bin Albert and Hanapie bin Zaini that there were Sri Datai excavators loading coal onto lorries on that day.

[43] The evidence in respect of the 1st defendant's allegation of trespass in Area SE1 is as follows. Abdillah bin Kepli (DW4) is an enforcement officer with Lands and Surveys Department of Mukah Division. He said that on 31 July 2008, he visited Area SE1 with fellow officers Harmezi bin Luli, Jamri bin Arbi and one Bakar ak Jelenggai who is an employee of the 1st defendant. When he arrived at Area SE1 he saw Sri Datai excavators and signs of mining activity. He saw the logo of Sri Datai on the excavators. He said that he verified he was in Area SE1 by checking his position with his hand held GPS device. He said as follows:

> Q: How did you know for sure that you were at the 1st defendant's 5 area SE1?
>
> A: When we went to SE1 on 31 July 2008, I verified the location by using my handheld GPS device and verified it according to the coordinates.

[44] During cross-examination, Abdillah bin Kepli was not challenged on his testimony that he had verified his position in Area SE1 by using his handheld GPS device. Abdillah bin Kepli also told the court during cross-examination that the workers he questioned on site told him that they worked for Sri Datai:

> Q: What question did you ask them?
>
> A: I was asking "which company was doing the mining activity there".
>
> Q: And what answer did you get?
>
> A: They told me that it was contractor of Sri Datai.

[45] This witness also told the court during cross-examination that he held the GPS device in his hand and that was the reason it did not appear in the photographs that he took.

[46] The last crucial witness called on behalf of the 1st defendant in respect of the counterclaim was Zulkfli Abdullah Rahman (DW6). He is a senior draftsman from the Lands and Surveys

Department of Mukah Division. He told the court that he plotted the MC areas of the plaintiff and the 1st defendant based on co-ordinates given in the annexure to the MC applications. He found no overlapping between their MC areas.

[47] In my opinion, the 1st defendant has proved on a balance of probabilities that the plaintiff's sub-contractor, Sri Datai had mined in areas SE1 and SE3. Stamford Sereth Muroh bin Albert and Abdillah bin Kepli had testified that they had visited areas SE1 and SE3. They were certain of the location of the areas they visited because they used a GPS device. Counsel for the plaintiff did not challenge them that they got their location wrong or that they did not use a GPS device. In respect of SE1, he only asked why the GPS device did not appear in the photographs that Abdillah bin Kepli took. In the premises, it must be accepted that 1st defendant's staff who were accompanied by the Mukah Land and Survey Department enforcement officers had actually visited areas SE1 and SE3 on the said dates. They witnessed coal being loaded onto Sri Datai lorries. They also saw lorries with the plaintiff's logo. Abdillah bin Kepli had even questioned the workers on site who told them they are from Sri Datai. The evidence from the plaintiff's own witness proved that Sri Datai is one of the mining sub-contractors of the plaintiff. Fabian Chang told the court that Sri Datai is one of the plaintiff's sub-contractors. I am mindful that Datu Stephen Wan said that the plaintiff had only one sub-contractor, ie, Modal Sempurna. However, he never explained why Fabian Chang said otherwise. The conclusion that Datu Stephen Wan had been less than candid cannot be avoided. The 1st defendant's witnesses had all taken photographs of excavators and lorries bearing the logo of the plaintiff and Sri Datai. The Senior Legal Officer (Sharifah Khadizah bin Wan Ali) of Sarawak Energy, the parent company of PPLS Power Generation Sdn Bhd, told the court that they purchased coal only from the plaintiff and the 1st defendant. Therefore an irresistible inference can be drawn that the coal illegally mined from the SE1 and SE3 by Sri Datai must have been for the benefit of the plaintiff.

[48] The argument of the plaintiff is that their areas (Area 2 and Area 3) and the 1st defendant area (SE3) overlapped. Counsel for the plaintiff also submitted that Area SE2 of the 1st defendant overlapped with Area 4 of the plaintiff. However, as the 1st defendant tendered evidence of trespass only in respect of Area

SE1 and SE3, this argument would not be relevant. The plaintiff's case of overlapping between their areas (Area 2 and 3) and Area SE3 of the 1st defendant is based on the excess mining rent that the plaintiff paid. Based on the mining rent, the plaintiff's MC area should have been 47 hectares instead of 35.9 hectares. I agree with counsel for the 1st defendant that excess mining rent does not necessarily mean that the plaintiff's MC area on the ground should have been bigger. The map and co-ordinates attached to the MC certificate should be the final determinant of boundary on the ground. Zulkfli Abdullah Rahman, the senior draftsman from the Lands and Surveys Department of Mukah Division whose expertise was not successfully challenged, convincingly demonstrated that based on the coordinates attached to the MC application of the plaintiff and the 1st defendant, there was no overlapping between their MC areas. I shall accept his evidence and rule that there was no overlapping between the MC areas of the plaintiff and the 1st defendant. I therefore find that the plaintiff has unlawfully trespassed and mined in the MC Area SE1 and SE3 of the 1st defendant.

Conclusion

[49] In the premises, I dismiss the claim of the plaintiff against all the defendants. The counterclaim of the 1st defendant is allowed and damages will be assessed by the SAR on a date to be fixed and an injunction is granted to restrain the plaintiff, by itself or its servants or agents or otherwise from entering into and carrying out any mining operations or activities within the 1st defendant's areas SE1, SE2 and SE3 covered by Mining Certificate No. 10D/MC/01/2008. The damages to be assessed by SAR, if any, will carry 8% interests from the date of the writ.